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40pp No. 06-1195

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *ET AL.*,

Petitioners,

v.

GEORGE W. BUSH, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF THE FOUNDATION FOR DEFENSE OF DEMOCRACIES, CENTER FOR SECURITY POLICY, AND THE COMMITTEE ON THE PRESENT DANGER IN SUPPORT OF RESPONDENTS

ANDREW G. MCBRIDE
Counsel of Record
WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
HOWARD ANGLIN
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amici Curiae

October 9, 2007

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COUNSEL PRESS
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INTEREST OF *AMICI CURIAE*[1]

The Foundation for Defense of Democracies ("FDD") is a policy institute dedicated to promoting pluralism, defending democratic values, and fighting the ideologies that drive terrorism. FDD was founded shortly after September 11, 2001, to engage in the worldwide war of ideas and to support the defense of democratic societies under assault by terrorism and militant Islamism. FDD's Center for Law & Counterterrorism promotes legal policies that strengthen American national security, and the Center is led in this filing by its Director, Andrew C. McCarthy, former Assistant U.S. Attorney for the Southern District of New York, and advisers Bradford A. Berenson, former Associate Counsel to President Bush, the Honorable Robert H. Bork, former judge, U.S. Court of Appeals for the District of Columbia Circuit, the Honorable Joseph DiGenova, former U.S. Attorney for the District of Columbia, and Victoria Toensing, former Deputy Assistant U.S. Attorney General, Terrorism Unit.

The Center for Security Policy is committed to the time-tested philosophy of promoting international peace through American strength. It accomplishes this goal by stimulating and informing national and international policy debates, in particular those involving regional defense, economic, financial, and technological developments that bear upon the security of the United States. The Center is led in this filing by its President, Frank J. Gaffney, Jr., former Assistant Secretary of Defense for International Security Policy.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that counsel for *amici* authored this brief in its entirety. No person or entity other than *amici curiae* and their counsel made any monetary contribution to the preparation of this brief. Letters of consent to the filing of this brief from Petitioners' counsel have been filed with the Clerk of the Court. *Amici* have sought and obtained the consent of Respondents' counsel to submit this brief. Such consent is submitted herewith.

The Committee on the Present Danger is an organization dedicated to protecting and expanding democracy by supporting policies aimed at winning the global war against terrorism and the movements and ideologies that drive it. It supports policies that use appropriate means—military, economic, political, social—to achieve this goal.

Amici have a substantial interest in this case, which, if wrongly decided, could impair our Nation's ability to defend itself from external threats. Despite Petitioners' argument to the contrary, noncitizen enemy combatants are not entitled to the constitutional writ of habeas corpus. Moreover, Congress replaced access to the statutory writ of habeas corpus with alternate judicial review procedures better suited to the countervailing military needs. In particular, Congress understood that the "plenary" habeas review sought here would fundamentally undermine ongoing military operations by hampering intelligence operations, preventing interrogation of enemy combatants, distracting military officers from their mission, and allowing civilian courtrooms to become a platform for Al-Qaeda propaganda. *Amici* share the view that this judgment—reached by the political branches at the urging of this Court—is entitled to substantial deference and should be upheld on review. For these reasons, *amici* respectfully file this brief in support of Respondents and urge the Court to affirm the judgment below.

INTRODUCTION

Petitioners in these consolidated cases frame the question before the Court in terms of the denial of fundamental constitutional rights. They would have this Court presume that a noncitizen enemy combatant has a right to both the writ of habeas corpus and the underlying constitutional guarantees it is designed to enforce, thereby shifting the burden to the Government to justify its putative "suspension" of those rights. But Petitioners' theory rests on a distortion of legal and historical precedent. Indeed, this Court has never recognized a

constitutional right to the writ of habeas corpus for a noncitizen enemy combatant. Petitioners therefore ignore the central question presented in this case: Whether Congress, in its discretion, has extended the "privilege" of the writ to these individuals. As this Court recognized in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), it is duty bound to enforce the expressed will of Congress. Here, Congress, in the Military Commissions Act ("MCA"), reached the judgment that judicial review will be extended to noncitizen enemy combatants only under terms that ensure that ongoing military operations are not undermined.

Petitioners' argument that they are entitled to the protection of the Great Writ contradicts the plain language of the Suspension Clause, U.S. Const. art. I, § 9, which highlights the domestic focus of the writ. This plain language reflects the Framers' reasoned decision to impose certain constitutional constraints on the Executive's ability to enforce domestic law against the body politic, while at the same time granting the Executive, as Commander in Chief, the war powers necessary to repel external threats. Indeed, this Court has recognized the importance of the Commander-in-Chief's plenary authority over enemy aliens. *Johnson v. Eisentrager*, 339 U.S. 763, 774 (1950). Petitioners ignore the dual role of the Executive in our constitutional order when they demand access to legal rights available to members of our society. Foreign enemies bent on destroying this Nation are not entitled to the writ of habeas corpus under the Constitution. *Id.*

That Petitioners are detained at the United States Naval Base at Guantanamo Bay does not alter this constitutional calculus. A noncitizen acquires constitutional rights, including a right to petition United States courts for the writ of habeas corpus, only after he establishes voluntary, lawful connections with this country. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). Petitioners' sole connection to the United States is the Executive's decision to hold them at a secure military

base under U.S. control. This involuntary presence, without more, is insufficient to confer constitutional rights. During World War II, while the United States detained more than 400,000 enemy combatants on domestic soil, there was not a hint that they possessed a constitutional right to challenge their status or detention through the writ of habeas corpus. S. Rep. No. 110-90, pt. VII, at 15 (2007). Petitioners have no response—indeed, they do not even attempt to respond—to this historical precedent.

As in World War II, Congress and the President have jointly decided on the appropriate treatment of persons held as enemy combatants. The political branches being of one mind, this Court should not gainsay their judgment. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). In any event, the process provided by Congress and the President in the MCA for reviewing the status of noncitizen enemy combatants is consistent with the process approved by this Court for the treatment of American citizens detained on domestic soil as enemy combatants. *Hamdi v. Rumsfeld*, 542 U.S. 507, 538-40 (2004). What is adequate process for a U.S. citizen is perforce satisfactory for an alien enemy combatant.

By contrast, granting the writ of habeas corpus to noncitizen enemy combatants for the first time in our Nation's history would severely hamper our ability to wage war and hinder our broader national security efforts. Extending the writ in this manner would radically constrain the ability of our military to prosecute this and future wars by publicly exposing intelligence that must remain secret and curtailing interrogation—currently the most effective weapon against terrorism. In addition, it would frustrate and distract our military by removing soldiers and their commanders from the battlefield and forcing them to justify their actions in defense of our country as witnesses in our civilian courts. Finally, plenary habeas review would invite massive detainee litigation, clogging the federal courts and enabling our enemies to wage a propaganda war against us using the platform

of our own legal system. In short, the extension of habeas rights to noncitizen enemy combatants is "impracticable and anomalous," *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring), will "hamper the war effort and bring aid and comfort to the enemy." *Eisentrager*, 339 U.S. at 779. For all these reasons, the judgment below should be affirmed.

ARGUMENT

I. THE CONSTITUTIONAL WRIT OF HABEAS CORPUS HAS NEVER BEEN EXTENDED TO NONCITIZEN ENEMY COMBATANTS.

The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9. The importance of the writ to domestic liberty cannot be denied: "Throughout the centuries the Great Writ has been the shield of personal freedom insuring liberty to persons illegally detained." *Smith v. Bennett*, 365 U.S. 708, 714 (1961). However, it is not a universal privilege; rather, like all constitutional provisions, the writ has defined limitations. In the present context, as Justice Scalia (joined by Justice Stevens) has explained, the limitations are clear: Access to the writ extends "to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court." *Hamdi*, 542 U.S. at 577 (Scalia, J., dissenting). Petitioners do not meet this standard; they are arguing that a statute conflicts with a constitutional right they never enjoyed.

Limiting constitutional habeas relief to persons with some voluntary connection to the body politic comports with the decidedly internal focus of the Constitution. The Framers recognized that, in the name of maintaining domestic peace, an overzealous or tyrannical central government could oppress the very society it was formed to protect. *Perpich v. U.S. Dep't of Def.*, 880 F.2d 11, 24 (8th Cir. 1989) ("Strange as it may now seem, the Framers feared that if the militia did not exist to protect

state interests, the army might be used by the federal government to oppress the states and their citizens."), *aff'd*, 496 U.S. 334 (1990). To this end, both the original Constitution and the Bill of Rights contain a number of specific constraints on the Executive's law enforcement power. *See, e.g., Singer v. United States*, 380 U.S. 24, 31 (1965) ("The [trial-by-jury] clause was clearly intended to protect the accused from oppression by the Government."). Simply put, to check the federal government's ability to oppress the body politic, the Constitution sacrifices efficiency in the enforcement of domestic laws in favor of certain guarantees of individual liberty. *See, e.g., Bloom v. Illinois*, 391 U.S. 194, 209 (1968) ("Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution.").

The situation is categorically different when the Nation faces an external threat. In war, the Executive does not use its domestic disciplinary powers to sanction an errant member of society; rather, it exercises its Commander-in-Chief powers to defeat warring enemies and preserve the very foundation of our society's civil liberties. *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." (citations omitted)). In such cases, the Constitution is not concerned with handicapping the government to preserve competing values. To the contrary, the Constitution maximizes the government's efficiency to achieve victory, even if it means bearing costs that would be unacceptable in the domestic realm. *Burns v. Wilson*, 346 U.S. 137, 152 (1953) (Douglas, J., dissenting) (agreeing with majority that "[o]f course the military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments. That is the meaning of *Ex parte Quirin*."). The idea that the President's decision to take coercive action against persons or property in this context can be restricted by an appeal to the norms of domestic law enforcement, including constitutional safeguards such as due process or habeas corpus, is ill-conceived. *Ex parte Kumezo Kawato*,

317 U.S. 69, 75 (1942) ("The ancient rule against suits by resident alien enemies has survived only so far as necessary *to prevent use of the courts to accomplish a purpose which might hamper our own war efforts* or give aid to the enemy." (emphasis added)).[2]

Permitting noncitizen enemy combatants access to the Great Writ not only represents an ahistorical contortion of the Constitution, it would render the Suspension Clause oddly underinclusive. Although the Framers were obviously aware that the United States would be called upon to fight in foreign wars, they did not provide for suspension of the writ in cases of attacks by or upon American forces abroad. Thus, under Petitioners' interpretation, enemy forces would have access to habeas corpus relief, which Congress could *never* suspend, no matter how urgently "the public Safety may require it," U.S. Const. art. I, § 9, so long as the battle never reached our shores. The protective reach of the Great Writ cannot reasonably be read to exceed Congress' authority under the Suspension Clause. At bottom, the Framers considered it necessary to provide for suspension of the writ only when military operations took place on domestic soil because it was self-evident that the writ was not available in foreign military conflicts. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

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[2] Judicial review, by writ of habeas corpus or otherwise, has never extended to the full scope of powers that can be exercised by the political branches. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (explaining that some political judgments "are, by the constitution and laws, submitted to the executive [and] can never be made in this court"). Petitioners attempt to avoid this limitation on judicial review by conflating the judicial check on the authority of the political branches in the domestic realm with the free hand granted those branches in the conduct of foreign policy and in the exercise of the war powers. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[T]he conduct of foreign relations [and] the war power . . . are so exclusively entrusted to the Political branches of government as to be largely immune from judicial inquiry or interference.").

For all these reasons, the Court has explained that whether and to what extent an alien can invoke the protections of the Constitution depends on the degree to which he has voluntarily associated himself with American society. *Verdugo-Urquidez*, 494 U.S. at 269 (holding that "'[t]he alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society'" (quoting *Eisentrager*, 339 U.S. at 770)). Thus, an alien who has been lawfully admitted to this country possesses many of the same constitutional rights as American citizens. *See, e.g.*, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (holding that a resident alien is a "person" within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (applying Just Compensation Clause of the Fifth Amendment to resident aliens); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that resident aliens are entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment protects resident aliens).[3]

In contrast, these constitutional protections do not obtain where the alien does not "voluntarily" and "lawfully" associate himself with American society. *Verdugo-Urquidez*, 494 U.S. at 271 ("[A]liens receive constitutional protections when they have

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[3] Somewhere further down the scale of rights are those owed to an alien who has entered the United States illegally but voluntarily, and with no malignant purpose. Although the constitutional rights due an illegal alien are probably less expansive than those possessed by a resident alien, this Court has held that an illegal alien is protected by some subset of constitutional rights. *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982). The Court also has emphasized that the circumstances in which the nation finds itself are an important factor to consider under such circumstances. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that "we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security").

come within the territory of the United States and developed substantial connections with this country."); *Kwong Hai Chew*, 344 U.S. at 598 n.5 ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." (internal quotation marks omitted)); *Rosner v. United States*, 231 F. Supp. 2d 1202, 1214 (S.D. Fla. 2002) (explaining that plaintiffs "failed to allege adequate connections, at the time of the alleged taking, to rescue their claim" because "at the time of the alleged taking, none of the Plaintiffs were United States citizens, and none had espoused any voluntary association with the United States of the type contemplated by the Supreme Court").

Under this standard, no constitutional rights appertain to Petitioners, who have never "developed substantial connections" with the United States.[4] *Verdugo-Urquidez*, 494 U.S. at 271. Indeed, Petitioners concede that they have neither lawfully nor voluntarily entered or resided here. Rather, Petitioners' only connection with the United States is their apparent desire to attack it and its citizens. This connection could not be further from the type of domestic presence necessary to secure rights equal to those guaranteed by the Constitution to the body politic. *Eisentrager*, 339 U.S. at 774-75 ("[I]t seems not then to have been supposed [by our founders] that a nation's obligations to its foes could ever be put on parity with those to its defenders."). For this reason, it is unsurprising that Petitioners are unable to

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[4] *Ex Parte Quirin*, 317 U.S. 1 (1942), is fully consistent with this understanding. All of the petitioners in *Quirin* had resided in the United States for a considerable period and one of the petitioners, Haupt, claimed U.S. citizenship. *Id.* at 20 ("All the petitioners were born in Germany; all have lived in the United States."). The Petitioners in *Quirin*, unlike Petitioners here, thus had connections to the United States that were voluntary and substantial. Moreover, despite proceeding to the merits of Petitioners' challenge, the *Quirin* Court ultimately denied the petitions for writ of habeas corpus. *Id.* at 48.

cite a single precedent of this Court granting the writ to review a President's decision to hold a noncitizen apprehended overseas as an enemy combatant during active hostilities.

Petitioners nevertheless attempt to dismiss this entire body of law based on their detention at the Guantanamo Bay Naval Base, which they assert is within the "territorial jurisdiction" of the United States. Brief for the *Boumediene* Petitioners at 10, Boumediene v. Bush, No. 06-1195 (U.S. Aug. 24, 2007) (quoting *Rasul*, 542 U.S. at 480). In so doing, Petitioners advance the same "global view . . . of the application of the Constitution" that this Court emphatically rejected in *Verdugo-Urquidez*, when it held that "not every constitutional provision applies to governmental activity *even where the United States has sovereign power.*" 494 U.S. at 268 (emphasis added) (citation omitted). As explained above, constitutional rights for noncitizens follow voluntary, lawful association with this Nation; they do not attach to a noncitizen upon mere involuntary presence in a location where the United States exerts some control. An alien enemy combatant who clearly has no constitutional rights at the time of his capture outside the United States does not acquire such rights simply as a result of the Executive's decision to bring him, against his will, to territory under some U.S. control. Such an alien still lacks *any* voluntary connection with this country—much less the *substantial* voluntary connection necessary to confer constitutional rights. *Id.* at 273 ("[R]espondent had no voluntary connection with this country that might place him among 'the people' of the United States.").

Petitioners were brought to Guantanamo Bay by the United States military, Brief for the *Boumediene* Petitioners at 2, and allege no other connection to the United States. Even if one accepts Petitioners' argument that land leased from a foreign government is legally indistinguishable from sovereign territory, Petitioners' argument still fails. This Court has held that lawful detention *even within the United States* is not alone sufficient

to confer constitutional rights. *Verdugo-Urquidez*, 494 U.S. at 271 (explaining that "this sort of presence—lawful but involuntary—is not of the sort to indicate any substantial connection with our country"). Just as this Court did "not think the applicability of the Fourth Amendment . . . should turn on the fortuitous circumstance of whether the custodian of [a] nonresident alien owner had or had not transported him to the United States," *id.* at 272, neither does Petitioners' access to the writ of habeas corpus turn on the President's decision that Petitioners would be more safely held at Guantanamo Bay than in a military facility even further from American shores.

While there is no precedent in this Court's jurisprudence for granting Petitioners access to the writ of habeas corpus, there is substantial historical precedent for withholding it. During and after World War II, more than 400,000 enemy combatants were detained on U.S. soil. *Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review: Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Rear Adm. John D. Hutson, Ret., President and Dean, Franklin Pierce Law Center) [hereinafter Hutson Testimony]. It was never suggested that they could have petitioned U.S. courts to challenge the fact or the conditions of their confinement. Petitioners never mention, let alone attempt to distinguish, the treatment of enemy combatants held on U.S. soil without the benefit of habeas corpus during World War II. The brief of *amici curiae* professors of constitutional law and federal jurisdiction at least acknowledges this most obvious historical precedent, but does so in a footnote that reads, in its entirety: "The clarity of the right to detain helps to explain why proceedings were not brought on behalf of German soldiers brought to the United States as prisoners of war in the Second World War." Brief of Professors of Constitutional Law and Federal Jurisdiction as *Amici Curiae* in Support of Petitioners at 11 n.19, Boumediene v. Bush, Nos. 06-1195 & 1196 (U.S. Aug. 24, 2007).

This dismissal of the direct relevance of the World War II detentions to this case is incomplete and inaccurate. It is not clear what *amici curiae* professors mean by their Delphic reference to "[t]he clarity of the right to detain"—surely if that right were clear, this case would not be before this Court. Moreover, the history of the World War II detentions is not nearly as straightforward as the footnote suggests. Even if one accepts that the "right to detain" was clear during World War II, this does not explain why no petitions were brought to challenge the conditions in the detention camps, which were in many cases far worse than those at Guantanamo Bay. The World War II detentions are direct and recent evidence of the unavailability of habeas corpus to alien enemy combatants, even those held on U.S. soil. Petitioners simply ignore this precedent, leaving it to *amici curiae* to bury it in a footnote.

Nor does being an alleged national of a non-hostile country alter the jurisdictional calculus. Included among the more than 400,000 enemy combatants detained in the United States during and immediately after World War II were Russian and Polish nationals deemed to be enemy combatants by the United States or its allies. Elena Kosmach, *Belarusans in the United States*, Canadian Slavonic Papers, Vol. 43, Issue 2 (2001) ("The participants of the World War II Wave were prisoners of war who after the war chose to stay in the United States. These were either former soldiers of the Soviet or Polish armies who fell into German hands and were taken prisoner by the Americans[.]"). Many claimed to be civilians mistakenly swept up with the capture of German troops; others were part of German forced-labor battalions who were pressed into the service of the enemy. Given the sheer number of prisoners involved, it is a near certainty that some individuals were unjustly or mistakenly detained. Yet no-one at the time doubted that it was within the power of our military forces to meet them as enemies in the field and hold them without trial upon capture. Citizens of friendly nations presumed to be enemy combatants during World War II were no more entitled to the writ of habeas

corpus than were the German soldiers with whom they were held, and no court of law has ever suggested otherwise.

In sum, the Constitution was not designed to allow foreign enemies bent on killing Americans access to the Great Writ. Rather, such constitutional protections are structural barriers that prevent the central government from oppressing the governed. The Framers understood that it was necessary and prudent to sacrifice some efficiency in the criminal justice system to ensure individual liberty. This sacrifice is neither necessary nor warranted when the Nation confronts an external threat. The Constitution, in these circumstances, frees the federal government to direct its full might at foreign enemies without concern for the individual liberty of those who would attack us. Petitioners' attempt to secure constitutional rights, including the right to habeas corpus, for noncitizen enemy combatants should be flatly rejected.

II. THE MCA REFLECTS THE JUDGMENT OF THE POLITICAL BRANCHES TO LIMIT ACCESS TO U.S. COURTS FOR NONCITIZEN ENEMY COMBATANTS.

In *Rasul v. Bush*, 542 U.S. 466 (2004), this Court held that the statutory writ of habeas corpus extended to noncitizen enemy combatants held at Guantanamo Bay. *Id.* at 476 (distinguishing *Eisentrager* on the ground that "the facts critical to [that] disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus"). In a decision issued that same day, the Court held that a U.S. citizen detained at Guantanamo Bay was entitled, through habeas corpus review, to a "meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." *Hamdi*, 542 U.S. at 508. And, more recently, the Court held that Congress—not the President—had principal control over the confinement of noncitizen enemy combatants, including the decision to deprive these individuals of access to the statutory writ of habeas corpus. *Hamdan*, 126 S. Ct. at 2764 (employing "[o]rdinary principles

of statutory construction . . . to rebut the Government's theory" that Hamdan's right to habeas corpus had not been stripped by Congress under the Detainee Treatment Act of 2005).

The Court was careful to explain, however, that it was not imposing its policy views as to the proper treatment of noncitizen enemy combatants on the political branches. Rather, the Court was merely preventing the Executive from encroaching on Congress' legislative terrain. As Justice Kennedy (joined by Justices Breyer, Souter, and Ginsburg) explained, "domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so." *Id.* at 2800 (Kennedy, J., concurring); *id.* (explaining that because "Congress has prescribed these limits, Congress can change them"); Samuel Estreicher & The Hon. Diarmuid O'Scannlain, *The Limits of* Hamdan v. Rumsfeld, 9 The Green Bag 2d 353, 357 (2006) ("*Hamdan* is not a constitutional ruling, but rather a decision about the presence vel non of congressional authorization and the content of any Congressional limits on the President's use of military commissions.").

Justice Breyer (joined by Justices Kennedy, Souter, and Ginsburg), likewise encouraged the President to "return[] to Congress to seek the authority he believes necessary." *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring). As he explained:

> Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

Id. The President heeded this call and returned to Congress. The ensuing legislative process resulted in the passage of the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"). The MCA thus reflects the collective wisdom

of the President and Congress in how best to address the status of noncitizen enemy combatants.

The MCA unambiguously removed from the federal courts jurisdiction over all pending or future habeas petitions "without exception," *id.* § 7(b), and replaced that process for a system of review better suited to this circumstance, *id.* § 7(a), 28 U.S.C. § 2241(e). There can be no dispute as to Congress' intent in this regard: "It is almost as if the proponents of [the MCA] were slamming their fists on the table shouting 'When we say "all," we mean all—**without exception!**'" *Boumediene v. Bush*, 476 F.3d 981, 987 (D.C. Cir. 2007) (emphasis in original). Indeed, even those in Congress most ardently opposed to the MCA recognized its effect. S. Rep. No. 110-90, at 4 ("The MCA also amended the DTA to definitively restrict access to federal courts by all alien enemy combatants, and those awaiting determination whether or not they were enemy combatants, by eliminating pending and future habeas claims other than the limited review of military proceedings permitted under the DTA.").

Federal legislation in the area of military affairs is entitled to the strongest presumption of validity. In matters of war and peace, collective action by the political branches charged with defeating foreign aggressors rarely should be overturned in court. *Rasul*, 452 U.S. at 487 (Kennedy, J., concurring) ("[T]here is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs."); *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."); *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (explaining that if "Congress chooses not to confront the President, it is not [the courts'] task to do

so"). Congress and the President are best positioned to determine the measures necessary to defeat this brutal enemy. Having repeatedly encouraged the President to seek the necessary legislative changes, an abrupt usurpation of this quintessentially political judgment would damage the Court as an institution.

Regardless, despite the fact that alien enemy combatants have no constitutional right to habeas relief or due process, Congress and the President have provided alien enemy combatants unprecedented procedural rights in the form of Combat Status Review Tribunals ("CSRTs"). Here, the review process chosen by Congress is substantially similar to that deemed sufficient to protect the rights of U.S. citizens in *Hamdi*, in which the Court ruled that a U.S. citizen designated an enemy combatant may be held indefinitely within the territorial jurisdiction of the United States without prosecution provided he is afforded *some* due process that need not rise to the level of full Fifth or Fourteenth Amendment protection.[5] 542 U.S. at 533. Consequently, under *Hamdi*, the due process rights of a U.S. citizen held as an enemy combatant are met by a limited status review process that provides "notice of the factual basis for . . . classification, and a fair opportunity to rebut the

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[5] The Court repeatedly stressed that its decision was influenced by the fact of Hamdi's U.S. citizenship and the unique privileges conferred thereby. *See, e.g., Hamdi*, 542 U.S. at 509 ("[W]e are called upon to consider the legality of the Government's detention *of a United States citizen* on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such." (emphasis added)); *id.* ("[D]ue process demands that a *citizen* held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." (emphasis added)); *id.* at 516 ("We therefore answer only the narrow question before us: whether the detention of *citizens* falling within that definition is authorized." (emphasis added)).

Government's factual assertions before a neutral decisionmaker." *Id.*

In particular, the Court expressly approved significant practical deviations from constitutional due process, including the admissibility of hearsay testimony and placing the burden on the detainee to rebut the Government's presumptively true evidence, and suggested that a process like that described in Army Regulation ("AR") 190-8 would satisfy the Constitution. *Id.* at 538 (citing Headquarters Dep'ts of Army, Navy, Air Force, and Marine Corps, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, ch. 1, § 1-6 (1997)). If the restrictions approved by this Court in *Hamdi* are acceptable for U.S. citizens, then CSRTs, which closely track the procedures set out in AR 190-8, *see* S. Rep. No. 110-90, at 41-43, are an extraordinarily generous concession to noncitizen enemy combatants.

Moreover, the MCA provides for full Article III review of the CSRT process in the U.S. Court of Appeals for the District of Columbia Circuit. MCA § 3, 10 U.S.C. § 950g. Under the MCA, the D.C. Circuit is empowered to review "(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and (2) to the extent applicable, the Constitution and the laws of the United States." *Id.* § 950g(c). The D.C. Circuit, however, "may not review the final judgment until all other appeals under this chapter have been waived or exhausted." *Id.* § 950g(a)(1)(B). The MCA also provides for Supreme Court review of the D.C. Circuit decision. *Id.* § 950g(d) ("The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28.").

Thus, even if Petitioners were entitled to habeas corpus review under the Constitution, which they are not, Congress' decision to tailor that review to ensure that it does not undermine ongoing military operations does not amount to a suspension of the Writ. *INS v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001)

("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals."); *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (explaining that "the substitution of a new collateral remedy which is both adequate and effective should [not] be regarded as a suspension of the Great Writ within the meaning of the Constitution"). The MCA thus "reflect[s] a balancing of objectives (sometimes controversial)"—a balancing which, as this Court has recognized, is "normally for Congress to make." *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (citations omitted).[6] Simply put, the collective sufficiency of the CSRT process and the subsequent Article III review obviates the need even to address Petitioners' constitutional habeas corpus claim.

III. THE "PLENARY" HABEAS REVIEW SOUGHT BY PETITIONERS WOULD HAVE GRAVE NATIONAL SECURITY CONSEQUENCES.

A. Plenary Habeas Review Would Severely Hamper Our Ability To Wage War By Undermining Intelligence Efforts.

The Constitution charges the federal government with ensuring national security. U.S. Const. art IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion."). Obtaining intelligence is indispensable to this task.

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[6] The MCA is not different, in this regard, from the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). AEDPA, which placed procedural and substantive constraints on federal judicial review of state criminal convictions, reflected a congressional judgment that the interest of state prisoners in immediate and unconstrained federal habeas review must be tempered by the federal government's interest in effective administration of criminal justice. *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Analogously, the MCA balances the federal government's national security needs against the desire of enemy combatants to obtain immediate federal habeas relief by placing some procedural and substantive limits on judicial review of CSRT decisions.

Snepp v. United States, 444 U.S. 507, 512 n.7 (1980) ("It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence."); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). Our Founding Fathers fully understood this need: This "practice of American intelligence in its various forms is readily traceable to the earliest days of the nation's existence. The Founding Fathers . . . fully recognized that intelligence is as vital an element of national defense as a strong military." P.K. Rose, *The Founding Fathers of American Intelligence* 21 (1999); Christopher Andrew, *For the President's Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush* 7 (1995) ("The Continental Congress was quick to grasp the need for foreign intelligence during the Revolutionary War"; thus, "it created the Committee of Secret Correspondence, the distant ancestor of today's CIA, 'for the sole purpose of Corresponding with our friends in Great Britain, Ireland and other parts of the world.'").

Federal-court litigation threatens our intelligence efforts, and thus our national security, because it affords all parties, including terrorists, the right of discovery. *See, e.g., United States v. Bin Laden*, 132 F. Supp. 2d 168 (S.D.N.Y. 2001). Naturally, the best evidence pertaining to the detention of enemy combatants—sources, witnesses, and methods—is often classified and unknown to the enemy. *See, e.g., CIA v. Sims*, 471 U.S. 159, 167 (1985) (stating that the CIA is entrusted with "protecting the heart of all intelligence operations—'sources and methods'"); *id.* at 170 (explaining that without the "power to protect the secrecy and integrity of the intelligence process . . . the Agency would be virtually impotent"). Discovery requires the Government to surrender classified intelligence, including these sources, witnesses, and methods, directly to our enemies. *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (noting that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission").

Litigation thus makes it virtually certain that the Government's most highly sensitive and effective tools will be turned over to al Qaeda and other terrorist networks. *See, e.g.*, *Totten v. United States*, 92 U.S. 105, 107 (1875) (stating that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential"); *Tenet v. Doe*, 544 U.S. 1, 8 (2005) (holding that "*Totten* precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the Government"); *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S 139, 146-47 (1981). Indeed, during the 1995 prosecution of Omar Abdel Rahman, the noted "Blind Sheikh," prosecutors provided the defense with the names of approximately two hundred unindicted coconspirators. Those names reached Osama bin Laden in the Sudan within a matter of days. S. Rep. No. 110-90, at 14. In another terrorist prosecution, testimony about the use of cell phones alerted terrorists to the Government's method of monitoring their network. Within days the communication network ceased operation, and valuable intelligence was lost. *Id.* at 15. Judge Michael B. Mukasey explained that "there was a piece of innocuous testimony about the delivery of a battery for a cell phone," which resulted in the "communication network [being] shut down within days and intelligence was lost to the government forever, intelligence that might have prevented who knows what." *Id.*

A secondary—but equally damaging—effect of the forced disclosure of intelligence is the resulting loss of sources of information. Knowing that their identity and contributions may become publicized, sources will be reluctant to share intelligence with the United States: "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *Tenet*, 544 U.S. at 11 (quoting *Sims*, 471 U.S. at 175);

Snepp, 444 U.S. at 509 n.3. And on a larger scale, the forced disclosure of classified information could result in the loss of cooperation from foreign governments; the prospect of being publicly identified as an ally of the United States would be intolerable to many foreign governments, especially in the Middle East. *Sims*, 471 U.S. at 175 ("If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place.").

To be sure, the Government has an alternative to disclosing classified intelligence. *See, e.g.*, *Tenet*, 544 U.S. at 11 ("Forcing the Government to litigate these claims would also make it vulnerable to 'graymail,' *i.e.*, individual lawsuits brought to induce the CIA to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations."). But this alternative simply replaces one unpalatable result with another—the release of dangerous enemies, freeing them to return to the battlefield. *Reynolds*, 345 U.S. at 11. More than thirty detainees released from U.S. custody have returned to the battlefield. S. Rep. No. 110-90, at 13.[7] Moreover, this alternative does not alleviate the harm to intelligence efforts. Knowing that the United States may well be forced to release captured belligerents, our allies will have a strong incentive not to turn enemy operatives over to the United States. *Verdugo-Urquidez*, 494 U.S. at 275 (stating that the "Government must be able to functio[n] effectively in the company of sovereign

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[7] This statistic belies the claim that the "men detained at Guantanamo no longer present a danger to American citizens." Hutson Testimony, *supra*.

nations" (internal quotation marks omitted)). This would unquestionably deny us valuable sources of intelligence.[8]

Simply put, the broad habeas rights Petitioners seek are incompatible with national security. As then-General Washington observed, intelligence and intelligence sources relating to enemy operations must be kept "as secret as possible. For upon secrecy, success depends in most enterprises of the kind, and for want of it, they are generally defeated, however well planned and promising a favourable issue." 8 *The Writings of George Washington from the Original Manuscript Sources* 1745-1799, 478-79 (J. Fitzpatrick ed. 1933-1944).

B. Plenary Habeas Review Would Undermine Our Ability To Interrogate Our Enemies, One Of Our Most Effective Tools Of War.

Interrogation is the most effective method of gathering intelligence and often the sole means of uncovering terrorist plots. Isr. Gov't Press Office, Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity 78 (1987), *reprinted in* 23 Isr. L. Rev. 146 (1989) ("[E]ffective activity by the [General Security Service] to thwart terrorist acts is impossible without use of the tool of the interrogation of suspects, in order to extract from them vital information known only to them, and unobtainable by other methods."); S. Rep. No. 110-90, at 13. Interrogation of detainees at Guantanamo Bay has yielded troves of valuable intelligence, which has saved American lives by taking "potential mass murderers off the streets before they were able to kill." *Id.* at 38 (statement of President George W. Bush (Sept. 6, 2006)). Moreover, interrogation saves innocent lives by allowing intelligence agencies to more precisely target an

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[8] Hence, in reality, this is a Hobson's choice. Because of the failures of our civilian courts to protect sensitive and classified information, "[i]f forced to choose between exposing such information and allowing an Al Qaida member to go free, [intelligence agencies] will allow the terrorist to go free." S. Rep. No. 110-90, at 14.

enemy that gravely endangers civilians by hiding and conducting its operations within the civilian population. For example, Abu Zubaydah revealed during interrogation that Khalid Sheikh Mohammed ("KSM") was the mastermind of the September 11 attacks. Information provided by Zubaydah led to the capture of KSM, who subsequently revealed plans of other terrorist attacks. *Id.* In these and many other instances, interrogation has not only proven fruitful, but has also saved countless American lives. Moreover, interrogation has assisted us in our broader effort to "understand the enemy we face in this war" by painting a picture of al Qaeda's structure, financing, communications, logistics, travel routes, and safe havens. *Id.*

Plenary habeas review would cripple this most important tool. Interrogation experts explain that separating legal counsel from detainees is crucial to maintaining the atmosphere of dependency and trust necessary to fruitful interrogation. When legal counsel is inserted into an interrogation setting, detainees stop cooperating, leaving critical intelligence ungathered. Access to counsel provides detainees with the hope of release through litigation rather than cooperation, shutting off the pipeline of useful information. *Id.* at 17-18. It thus vastly diminishes interrogation's value as an effective weapon against terrorism. *Id.* at 18; *id.* at 13, 32 (citing reports of released detainees returning to the battlefield).

C. Plenary Habeas Review Would Force Our Soldiers To Defend Themselves In Civilian Courts Rather Than Defend Our Nation On The Battlefield.

Broad habeas review—and, in particular, the discovery process—would distract our commanders and soldiers from their battlefield duties and their singular goal of protecting our national security. Indeed, it would force them to defend themselves in court rather than defend the Nation on the battlefield. Moreover, forced participation in litigation would frustrate and undermine our forces by exposing American

soldiers to the indignity of justifying their battlefield actions in civilian courts.

First, habeas rights would complicate the combat role of soldiers on the battlefield. Whereas American soldiers have traditionally had but one objective—defeating the enemy—allowing alien enemy combatants to challenge their capture and detention would require American soldiers to collect evidence on the battlefield that could be used to uphold future detentions. At the same time they are engaged in conflict with the enemy, American soldiers thus would have to document their conduct on the battlefield, much as domestic police must fill out pages of paperwork each time they make a stop or arrest. *Detainees: Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of The Hon. William P. Barr, Former Att'y Gen. of the United States, Executive Vice-President and General Counsel, Verizon Corporation). This would wrongly inject legal uncertainty into military operations and divert resources from winning the war to proving individual fault. *Rasul*, 542 U.S. at 505 (Scalia, J., dissenting) ("For this court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort.").

Second, litigation will require the physical removal of soldiers from the battlefield to give evidence in civilian courts, thereby depleting our battlefield ranks and undermining the military campaign. Captured enemy belligerents, who once tried to remove American soldiers from the battlefield by killing them, would be able to achieve a similar result by subpoena. Instead of concentrating on defending our country, our commanders will be required to defend against discovery requests and depositions. *Hamdi*, 542 U.S. at 531-32 (considering the burdens of calling military officers home from the battlefield to engage in discovery). Every soldier and civilian with whom the detainee came into contact—from initial capture, through interrogation, even up to determination of status—could be subject to the

judicial process. Consider, for example, the arduous burden of responding to the district court's order in *Hamdi*, which required the Government to produce:

> copies of all of Hamdi's statements and the notes taken from interviews with him that related to his reasons for going to Afghanistan and his activities therein; a list of all interrogators who had questioned Hamdi and their names and addresses; statements by members of the Northern Alliance regarding Hamdi's surrender and capture; a list of the dates and locations of his capture and subsequent detentions; and the names and titles of the United States Government officials who made the determinations that Hamdi was an enemy combatant and that he should be moved to a naval brig.

542 U.S. at 513-14.

Third, habeas rights would place enormous logistical burdens on the military, which would detract from war-fighting capabilities. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 273-74 ("Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."). As if the burdens on our military were not already daunting, Petitioners would force the military to coordinate and use overstretched resources to transport soldiers, terrorists, witnesses, and evidence across the globe. "This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence." *Eisentrager*, 339 U.S. at 779; *United States v. Moussaoui*, 382 F.3d 453, 471 (4th Cir. 2004) (concluding that "the burdens that would arise from production of the enemy combatant witnesses are substantial").

Fourth, and last, habeas rights in the hands of the enemy would be an affront to American troops. *Eisentrager*, 339 U.S. at 779 (concluding that habeas proceedings would "diminish the prestige of our commanders, not only with enemies but with wavering neutrals"); *id.* ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."). The actions taken by American soldiers to capture terrorists will be put under a litigation microscope, allowing Al Qaeda to cross-examine soldiers who are compelled to take the stand by the subpoena power available to terrorists in civilian courts. S. Rep. No. 110-90, at 16. Nothing could be more demoralizing to an American soldier than being haled into federal court by an enemy combatant to account for his battlefield actions or to answer frivolous complaints about the routine administration of detention facilities. And it would be a sweet propaganda victory for al Qaeda to broadcast the testimony of American soldiers being forced to defend themselves and their actions on the witness stand.

No other country in history has put its soldiers in such a precarious position. The irony is acute: "If this Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers. . . . It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies." *Eisentrager*, 339 U.S. at 783.

D. Plenary Habeas Review Would Spur An Onslaught Of Detainee Litigation, Clogging The Federal Courts And Providing Our Enemies A New Front From Which To Attack Us.

The United States detained over two million prisoners during World War II, including more than 400,000 held inside the United States. S. Rep. No. 110-90, at 15. No doubt many

had complaints about their treatment; certainly there were instances of abuse. *See, e.g.*, Sharon Young, *MEANWHILE: Back when POWs were treated well*, Int'l Herald Trib., June 18, 2004. Yet none had the litigation rights claimed by the Petitioners. *Rasul*, 542 U.S. at 497-98 (Scalia, J., dissenting); *Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review: Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Bradford Berenson, Sidley Austin LLP) [hereinafter Berenson Testimony]. If even a small fraction of these detainees had sought habeas relief, it would have overwhelmed the judicial system. The onslaught of litigation that would follow from Petitioners' demands would render it impossible to hold large numbers of enemy combatants while hostilities prevailed.

Importantly, a ruling in this case will apply to all future conflicts, including one in which the only secure place to detain prisoners may be inside the United States, far from the battlefield, as was the case in World War II. This Court cannot assume that the United States will never again be required to fight a global war or hold tens of thousands of prisoners on U.S. soil. S. Rep. No. 110-90, at 16. This is especially true given the frequency with which the United States "employs Armed Forces outside this country," *Verdugo-Urquidez*, 494 U.S. at 273 (citing 200 examples in which the American military has been deployed), as well as the global reach of violent Islamic extremism.

The right of noncitizen enemy combatants to petition for habeas corpus would guarantee years of protracted and onerous litigation in the federal courts. *See, e.g.*, *Bismullah v. Gates*, Nos. 06-1197 & 1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007) (describing procedures applicable to CSRTs), *reh'g*

denied, Nos. 06-1197 & 1397 (D.C. Cir. Oct. 3, 2007). The issues left to be resolved in each individual case are legion, including whether the government must produce classified evidence or battlefield witnesses; how long it may question enemy combatants before they have access to a lawyer; how long each prisoner may be held; whether *Miranda* rights apply and, if so, at what point and under what circumstances they attach; what standard of review applies; and what precise permutation of due process rights, or deprivation of the same, will satisfy the Constitution. *Id.* at *13. ("[T]o evaluate the merits of each Parhat Petitioner's claims, we must review a separate record of that petitioner's status determination. Accordingly, each Parhat Petitioner will be assigned a separate case number and each case will be separately briefed and assigned to a merits panel, absent further order of this court[.]").[9]

Indeed, Counsel for Petitioners admit that their legal strategy will include several "rounds of litigation," which "is sure to continue, as the court of appeals struggles to address seriatim the numerous procedural questions left open." Brief for the *Boumediene* Petitioners at 31. Moreover, the flood of litigation will continue to swell as creative counsel seek ever more expansive constitutional protection for their clients.[10] Berenson

[9] Unlike the typical habeas case, which is judged using "well-worn procedural and evidentiary standards on a backdrop of centuries of precedent," Brief for the *Boumediene* Petitioners at 31, the dearth of precedent for extending habeas rights to noncitizen detainees ensures years of uncertain litigation over innumerable open questions. *Verdugo-Urquidez*, 494 U.S. at 274 (stating that extraterritorial application of the Fourth Amendment would "plunge [the Executive] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad").

[10] Detainees have already used habeas petitions to seek a preliminary injunction preventing interrogation, complain about the speed of mail delivery, and accuse military doctors of medical malpractice. S. Rep. No. 110-90, at 44. And they are quite likely to (Cont'd)

Testimony, *supra* (explaining that "*Rasul* . . . opened the floodgates—or, more accurately, it allowed the floodgates to remain open—to a massive amount of litigation in federal district court by militant Islamists held at Guantanamo against their captors").[11]

Our enemies, emboldened by counsel and discovery rights, have come to see litigation as a weapon to wage war on the United States. *Eisentrager*, 339 U.S. at 779 ("Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands."); S. Rep. No. 110-90, at 45. Even this Court has recognized that the writ of habeas corpus "has potentialities for evil as well as for good." *McCleskey v. Zant*, 499 U.S. 467, 496 (1991); *id.* ("Abuse of the writ may undermine

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(Cont'd)
claim the right to file civil-damage suits against American soldiers and civilians. *Rasul*, 542 U.S. at 500 (Scalia, J., dissenting) (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)); *Verdugo-Urquidez*, 494 U.S. at 274 (same).

[11] The logic of *Rasul*—combined with Petitioners claimed right to constitutional habeas corpus here—would also permit detainees held in American bases around the world to access habeas review. Indeed, Petitioners and their supporting *amici* have not hidden their ultimate objective. Brief for Petitioners El-Banna et al. at 20-21, Al Odah v. United States, No. 06-1196 (U.S. Aug. 24, 2007) (arguing that Guantanamo "is for all practical purposes American territory"); Brief of *Amici Curiae* Coalition of Non-Governmental Organizations in Support of Petitioners at 12, Boumediene v. Bush, Nos. 06-1195 & 1196 (U.S. Aug. 24, 2007) (arguing that Guantanamo is an "area[] of exclusive U.S. authority and control"). The same reasoning also would seem to apply to all of the U.S. Navy's afloat brigs. Such a dramatic result, which would authorize worldwide habeas jurisdiction, cannot be squared with the solely domestic focus of the text of the Suspension Clause, U.S. Const. art. I, § 9; *supra*, Part II, the Framers' experience of international wars, or any of this Court's precedents.

the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization."); S. Rep. No. 110-90, at 18, 44. For our enemies, the writ is not simply a vehicle for challenging their legal status; rather, it is a weapon used to wage a propaganda war—to disrupt and distract the U.S. military and the U.S. Government and to extract vital intelligence.

The burden on the federal judiciary of granting such broad habeas rights to enemy combatants would, for the foreseeable future, be substantial; in the case of a major global war in the future, it would be catastrophic. *Hamdi*, 542 U.S. at 535 (noting that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting"); *Verdugo-Urquidez*, 494 U.S. at 273 (extending the Fourth Amendment to aliens abroad "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries" (citation omitted)). And at the same time that it would pull soldiers off the current front lines, it would open a new front from which our enemies can attack us—our own federal courts.

CONCLUSION

For the reasons set forth herein, the judgment of the D.C. Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ANDREW G. MCBRIDE
Counsel of Record
WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
HOWARD ANGLIN
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amici Curiae